19 Am. Rep. 711; *Ashcraft* v. *Knoblock,* 146 Ind. 169, 174, 45 N. E. 69; *Mathews* v. *Menedger,* 2 McLean, (U. S.) 145. (3) The American rule sustained by the great weight of authority is that nothing short of full satisfaction or its equivalent can make good a plea of former judgment in tort, offered as a bar in an action against another joint tort-feasor who was not a party to the first judgment. The cases from the various states are collected in a note to the case of *Blackman* v. *Simpson,* 120 Mich. 377, as reported 58 L. R. A. 410.

The English doctrine, set out in (1) supra, has been followed by a few decisions in the United States. In Virginia, in 1808, the court held that in an action of trespass brought against one defendant, he may plead, in bar to a recovery, a judgment obtained against another defendant, for the same cause of action, in another suit. *Wilkes* v. *Jackson,* 2 Hen. & M. (Va.) 355. This decision was entirely sustained in *Petticolas* v. *Richmond,* 95 Va. 456, 28 S. E. 566. Rhode Island adhered to the English rule in *Hunt* v. *Bates,* 7 R. I. 217, 82 Am. Dec. 592, but that state was brought nearer to the American rule by the later case of *Parmenter* v. *Barstow,* 21 R. I. 410, 43 Atl. 1035. The rule set out in (2) supra, seems illogical. "If the mere election to pursue one trespasser were binding on the plaintiff as a release of all co-trespassers, it seems difficult to understand why that election is not as obvious when the suit has been prosecuted to final judgment as when the plaintiff takes the first step towards its enforcement. If, on the other hand, such election in no way involves the several causes of action against the other trespassers prior to issuing an execution, it is difficult to perceive why or how that event necessarily involves them." FREEMAN, JUDGMENTS, § 236. The principal case does away with this rule in Indiana, but Michigan still adheres to that rule. The rule set out in (3) supra, accepted by the great weight of American cases, appears to be based upon most logical and equitable principles. The liability of tort-feasors is joint and several. The injured party has the right to pursue them jointly or severally at his election, and recover separate judgments; but the injury being single, he may recover but one compensation. Therefore, he may elect *de melioribus damnis* and issue his execution accordingly, but if he obtains only partial satisfaction he has not precluded himself from proceeding against another co-tort-feasor; his election of the first judgment concluding him only as to the amount he may receive, and whatever has been recovered must apply *pro tanto* upon his further recovery. The plaintiff can have but one satisfaction for each trespass, whether he has recovered several judgments or one, and so very little hardship can result from this rule, while a great amount of justice can result from it. H. B. S.

WAIVER IN INSURANCE CONTRACTS.—Waiver is defined as the "intentional relinquishment of a known right." The doctrine of waiver was brought into use because of the feeling of the courts toward forfeitures and the principle in earlier times was most frequently illustrated and applied in

the law of landlord and tenant, and the courts, applying the doctrine to insurance law, did so by comparing the situation of the insured and insurer with that of a landlord having a right to oust his tenant. *Knickerbocker Life Ins. Co.* v. *Norton*, 96 U. S. 234; *Viele* v. *Germania Ins. Co.*, 26 Iowa 9.

The courts early differed regarding the question of consideration for the waiver. One line of authorities holds that a consideration must be present, since by the breach of the condition the contract is at an end and cannot be regarded as again in force unless a new and valuable consideration is given. VANCE, INS., 344. The other view, now come to be regarded as established law, is that the legal effect of a breach of condition in an insurance contract does not make the policy void, but merely voidable, and that it becomes void only on the election of the insured so to treat it. Hence a waiver, being the exercise of the right of election, needs no consideration, as it is neither a new contract, nor a change in terms, but rather the legal consequence of an election not to avoid such contract on account of a specific breach of condition. *Viele* v. *Germania Ins. Co.*, supra.

The distinction between waiver and estoppel is clear—the waiver is the intentional relinquishment of a known right and is actively performed—and this distinction is clearly set out in *Jones* v. *Savin* (Del. 1916) 96 Atl. 756, where the court states that waiver depends on what one intends himself to do, while estoppel depends on what he has caused his adversary to do. However, the courts have not stopped with express waiver, but have declared that to constitute a waiver there need only be an intention to waive, either expressed or plainly to be inferred from the circumstances. *Appel* v. *People's Surety Co.*, 132 N. Y. Supp. 200; *Noem* v. *Eq. Life Ins. Co. of Iowa*, (S. Dak. 1916) 157 N. W. 308. It is apparent that ordinarily, the same circumstances which will create an implied waiver will also be sufficient to constitute an estoppel. Thus, taking the usual example, the insurer when he accepts an overdue premium impliedly waives his right to declare the policy forfeited, or his act estops him from settting up the forfeiture. This interweaving of implied waiver and estoppel has led to the use of the two terms as synonomous, by both courts and text writers, and the result has been to throw the cases involving waiver and estoppel into hopeless confusion. This is well illustrated in *Globe Mut. Life Ins. Co.* v. *Wolff*, 96 U. S. 326, where Justice FIELD in the opinion states, "The doctrine of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct and enforce the conditions." This confusion has been rendered worse by the line of cases declaring that there can be no waiver unless some element of estoppel be present; recent examples of such holdings are: *Shearlock* v. *Mutual Life Ins. Co.*, (Mo. 1916) 182 S. W. 89, and *Chandler* v. *Hancock Mutual Life Ins. Co.*, 180 Mo. App. 394.

This condition of the law can be brought to an end only by the courts refusing longer to treat the terms as synonomous. The recent case of *Lee* v. *Casualty Company of America* (Conn. 1916), 96 Atl. 952, is a long step in the right direction. In this case the plaintiff was insured in the defendant casualty company and was afterwards injured. He notified the defendant of the accident, but later than the terms of the policy permitted. After the notice the parties tried for about two months to effect a settlement and then defendant announced that it would stand on its rights and that it had not waived any defense. The court held that the defendant by its conduct waived its right to insist on the defense, and that such a waiver is irrevocable. The case clearly shows the distinction between implied waiver and estoppel. The waiver is inferred from the conduct of the company, and the court states that there is no estoppel present, inasmuch as there is nothing in the case to show that the plaintiff was misled by the acts set forth.

The court clearly and expressly states that the party claiming the waiver need not be misled to his detriment by the insurer's conduct, a result which seems logically to follow from the distinction between waiver and estoppel ,and which directly overrules the third requisite for implied estoppel as given in VANCE, INS., 371 et seq., as that author holds to the proposition that implied waiver and estoppel are one. See also *Hollis* v. *State Ins. Co.,* 65 Iowa 454, which accords in principle with the *Lee* case.

R. H. N.